

STATE OF INDIANA  
DEPARTMENT OF HOMELAND SECURITY

IN RE:	)	CAUSE NO.
	)	
JACOBS, C.	)	DHS-1701-SDRF-001
	)	
	)	
	)	

**NOTICE OF NON-FINAL ORDER**

You are hereby notified that the attached document entitled **Findings of Fact, Conclusions of Law, and Non-Final Order** has been entered by the Administrative Law Judge in accordance with Indiana Code § 4-21.5-3-27.

The ultimate authority in this matter is the Executive Director for the Indiana Department of Homeland Security, Mr. Bryan J. Langley. Indiana Code § 4-21.5-3-29(d) requires any party seeking to preserve an objection to this order for judicial review to file a written objection that:

1. identifies the basis of the objection with reasonable particularity; and
2. is filed with Executive Director Bryan J. Langley within fifteen (15) days (or any longer period set by statute) after this order is served.

In the absence of an objection from a party or notice from the Executive Director of his intent to review any issue related to this order, the Executive Director shall affirm this order in accordance with Indiana Code § 4-21.5-3-29(c). **This order will be considered by Executive Director Bryan J. Langley and he will issue a Final Order within sixty (60) days from the issuance of this Non-Final Order of Dismissal.**

Date: June 27, 2017

  
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A copy of the foregoing and attachment was served by U.S. Postal Service upon the following parties and attorneys of record:

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FOR THE PETITIONER, PRO SE  
Christine Jacobs  
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REPRESENTATIVE FOR RESPONDENT  
Justin K. Guedel  
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**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND NON-FINAL ORDER**

On December 20, 2016, the Indiana Department of Homeland Security (“Respondent”) denied Christine Jacobs’ (“Petitioner’s”) application for a grant from the Indiana State Disaster Relief Fund (“Fund”). Petitioner sought grant funds from the Individual Assistance State Disaster Relief Fund Program (“Grant”) to help cover the cost of repairing flood damage to her home. Petitioner appealed Respondent’s denial of her grant application and, based on the evidence presented and for the reasons set forth below, the Administrative Law Judge **DENIES** Petitioner’s grant application.

**PROCEDURAL BACKGROUND**

On November 2, 2016, Petitioner submitted an application to Respondent for the Grant. Respondent denied Petitioner’s application and provided notice of the denial on December 20, 2016. Petitioner then filed a petition for review of Respondent’s denial on January 3, 2017, and Respondent granted the petition for review as timely on January 13, 2017. The undersigned Administrative Law Judge (“ALJ”) was appointed to adjudicate the appeal.

An initial prehearing conference was held on February 22, 2017. Petitioner appeared on her own behalf and Justin Guedel, Manuela Johnson, and Samantha Garrett appeared on behalf of Respondent. During the initial prehearing conference, the parties advised that they had not had an opportunity to discuss informal resolution and requested additional time to do so. The parties also agreed that the issue in this appeal would be limited to whether Petitioner is entitled to the Grant

for the damages to her basement and would exclude any discussion of Petitioner's entitlement to the Grant for the repair of her kitchen ceiling.<sup>1</sup>

A status conference was held in this matter on March 29, 2017. During the status conference, the parties advised the ALJ that informal resolution would not be possible in this case and requested to submit their evidence and arguments by written briefs and documentary evidence. The ALJ approved of this form of proceeding and set a briefing schedule. Petitioner timely filed her brief and evidence on April 27, 2017, and Respondent timely filed its brief and evidence on May 23, 2017.

### **BURDEN AND STANDARDS OF PROOF**

Indiana Code § 4-21.5-3-14(c) provides that at each stage of an administrative review, "the agency or other person requesting that an agency take action or asserting an affirmative defense specified by law has the burden of persuasion and the burden of going forward with the proof of the request or affirmative defense." That burden rests upon the agency when the agency is, in essence, prosecuting a petitioner for a regulatory violation. See Peabody Coal Co. v. Ralston, 578 N.E.2d 751, 754 (Ind. Ct. App. 1991). However, when the petitioner is seeking an agency action or claims entitlement to an exemption from regulatory requirements, the burden rests upon the petitioner. See Ind. Dep't of Natural Res. v. Krantz Bros. Constr. Corp., 581 N.E.2d 935, 938 (Ind. Ct. App. 1991).

Proceedings held before an ALJ are de novo, per Ind. Code § 4-21.5-3-14(d), which means the ALJ does not—and may not—defer to an agency's initial determination. Ind. Dep't of Natural Res. v. United Refuse Co., Inc., 615 N.E.2d 100, 104 (Ind. 1993). Instead, in its role as fact-finder, the ALJ must independently weigh the evidence in the record and matters officially noticed, and may base its findings and conclusions only upon that record. Id.; see also Ind. Code § 4-21.5-3-27(d). At a minimum, the ALJ's findings "must be based upon the kind of evidence that is substantial and reliable." Ind. Code § 4-21.5-3-27(d). "[S]ubstantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support the decision." St. Charles Tower, Inc. v. Bd. of Zoning Appeals, 873 N.E.2d 598, 601 (Ind. 2007). It is "something more

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<sup>1</sup> Petitioner applied for the Grant to cover the cost of repairing a leak in her kitchen ceiling and replacing a couch and a loveseat that were located in her basement. However, the Petitioner acknowledged in her petition for review that she understood the Grant would not cover the cost of repairing the leak in her kitchen ceiling, as the flood event did not cause the leak.

than a scintilla, but something less than a preponderance of the evidence.” State ex rel. Dep’t of Natural Res. v. Lehman, 177 Ind. App. 112, 119, 378 N.E.2d 31, 36 (1978) (internal footnotes omitted).

When an agency action puts a Fourteenth Amendment interest at risk, however, a higher standard of proof is required. Pendleton v. McCarty, 747 N.E.2d 56, 64–65 (Ind. Ct. App. 2001), trans. denied. “[I]n cases involving the potential deprivation of . . . protected property interests, the familiar ‘preponderance of the evidence standard’ [is] used.” Id. at 64. The higher “clear and convincing” standard is required when a protected liberty interest is at stake. Id. That is to say, this standard applies when “individual interests at stake in a particular state proceeding are both ‘particularly important’ and ‘more substantial than the mere loss of money’ or necessary to preserve fundamental fairness in a government-initiated proceeding that threaten[s] an individual with ‘a significant deprivation of liberty’ or ‘stigma’.” Burke v. City of Anderson, 612 N.E.2d 559, 565 (Ind. Ct. App. 1993), trans. denied (quoting In re Moore, 453 N.E.2d 971, 972 (Ind. 1983)); see also Pendleton, 747 N.E.2d at 64.

### FINDINGS OF FACT

Present in the record of proceedings is Respondent’s December 20, 2016 order denying Petitioner’s grant application, Petitioner’s petition for review, Respondent’s letter granting the petition for review, and the orders and notices issued by the ALJ. Petitioner also submitted as evidence with her brief portions of an Indiana Disaster Assistance application, a letter from Respondent regarding potential eligibility for the Grant, her petition for review, and Respondent’s order denying Petitioner’s grant application.<sup>2</sup> Respondent submitted as evidence with its brief a letter from Respondent regarding potential eligibility for the Grant, Petitioner’s grant application, the order from Respondent denying Petitioner’s grant application, Petitioner’s petition for review, the Initial Prehearing Order and Order Setting Status Conference for this matter, Petitioner’s brief, and the Affidavit of Manuela Johnson.<sup>3</sup> Based solely on that evidentiary record and any additional items specifically noted below, the ALJ hereby issues the following findings of fact:

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<sup>2</sup> These Exhibits are marked and—in the absence of any objections—admitted as Petitioner’s Exhibits 1, 2, 3, and 4, respectively.

<sup>3</sup> These Exhibits are marked and—in the absence of any objections—admitted as Respondent’s Exhibits 1, 2, 3, 4, 5, 6, and 7, respectively.

1. On October 27, 2016, Respondent sent a letter to Petitioner advising her that she may be eligible for the Grant. The letter set out eligibility requirements, explained the application process, and listed the information that she would need to provide with her application for the Grant. (Pet. Ex. 2; Resp. Ex. 1.)
2. On November 2, 2016, Petitioner submitted an application to Respondent for the Grant. (Resp. Ex. 2.)<sup>4</sup>
3. In Petitioner's application for the Grant, in the section titled "Insurance Information & Damages," and the subsection "Damaged rooms," Petitioner marked boxes for the Kitchen and Finished Basement only. Petitioner listed three (3) items in the "List of Damages" section of the application: (1) a brown couch that was located in a finished basement, with a purchase price of \$1,500; (2) a brown loveseat that was located in a finished basement, with a purchase price of \$800; and a leak in the kitchen ceiling. (Resp. Ex. 2.)
4. On December 20, 2016, Respondent provided a notice to Petitioner that it had denied her application for the Grant.
5. On January 3, 2017, Petitioner submitted a petition for review of Respondent's decision to deny her application for the Grant and Respondent granted the petition as timely on January 13, 2017.
6. The parties agreed to limit the issue in this appeal to whether Petitioner is entitled to the Grant to cover the damage in her basement. (Resp. Ex. 5.)

### CONCLUSIONS OF LAW

Applying the law set forth in this decision to the factual findings supported by the evidence, the ALJ hereby reaches the following conclusions of law with respect to the issues presented:

1. Petitioner is asking Respondent to approve her application and award her the Grant; therefore, she is requesting the agency to take action. Accordingly, the Petitioner bears the burdens of proof and production. Ind. Code § 4-21.5-3-14(c); Krantz Bros. Constr. Corp., 581 N.E.2d at 938.

A protected property or liberty interest is not at stake in this matter; therefore, the higher standards of proof used in such circumstances are not applicable here. Cf. Pendleton, 747 N.E.2d at 64. Instead, substantial and reliable evidence, which is the usual standard of proof for administrative appeals, applies. Ind. Code § 4-21.5-3-27(d).

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<sup>4</sup> Petitioner submitted her application for the Grant as an exhibit; however, it appears that she only provided portions of the application, rather than the entire form. Therefore, the ALJ will utilize Petitioner's grant application, marked as Respondent's Exhibit 2, for evidence relating to the content of Petitioner's application. See Petitioner's grant application, marked as Petitioner's Exhibit 1 and Respondent's Exhibit 2.

It is therefore the Petitioner's burden in this appeal to put forth substantial and reliable evidence demonstrating that she is entitled to receive the Grant, pursuant to the statutes and regulations governing the Fund.

2. The Fund is established by the Indiana Code and permits Respondent to adopt administrative rules in order to carry out the Fund's responsibilities. Ind. Code §§ 10-14-4-5, 10-14-4-11.

Respondent has adopted rules under 290 Ind. Admin. Code 1-2, which govern the administration of the Fund as it pertains to applications for individual assistance.

3. The purpose of the Fund is to provide financial assistance to eligible entities to cover the costs of repairing, replacing, or restoring public facilities or individual property that is damaged or destroyed by a disaster, as well as the costs of responding during a disaster. Ind. Code § 10-14-4-5.
4. Ind. Code § 10-14-4-6 establishes who may receive financial assistance from the Fund, stating in relevant part:

[T]he agency may use money in the fund to provide financial assistance as follows:

\* \* \*

(3) To an eligible entity:

(A) who is an individual;

(B) whose primary residence is located in a territory for which:

(i) the United States Small Business Administration declares a disaster; and

(ii) there has been no disaster declaration issued by the President of the United States;

(C) who has suffered damages to the entity's primary residence or individual property because of a disaster described in clause (B); and

(D) who complies with all the other requirements established by the agency.

Ind. Code § 10-14-4-6(3).<sup>5</sup>

5. Respondent argues that Petitioner is not entitled to the Grant; however, even if Petitioner met all of the requirements to be eligible for the Grant, Respondent contends that it is under no duty to provide a grant from the Fund to any applicant, including Petitioner. In support of its argument, Respondent

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<sup>5</sup> Eligible entity is defined as "a county, a city, a town, a township, or an individual who has incurred loss or cost because of a disaster." Ind. Code § 10-14-4-2.

references the language used in Ind. Code § 10-14-4-6, which states in relevant part “the agency *may* use money in the fund to provide financial assistance . . . to an eligible entity . . .” [emphasis added]. Respondent also states that none of the statutes and regulations governing the Fund require disbursement under this program. (Pet. Br. at 4.)

While the language in this statute does appear to give Respondent discretion in determining whether to award grants from the Fund, the existence of a duty by Respondent to award the Grant is irrelevant to determining whether the Petitioner is entitled to the Grant in this case because the ALJ is not examining Respondent’s initial determination. It is determining whether or not the Petitioner’s application should now be granted, based only upon the record and the evidence presented in this case. In addition, if Respondent could successfully use this reasoning to defend its grant application decisions, then providing appeal rights in these cases would have virtually no meaning.

6. Ind. Code § 10-14-4-13 provides additional guidance regarding how those who are eligible may qualify for individual assistance from the Fund, stating in relevant part:

(b) To qualify for financial assistance under this chapter, including a grant, an eligible entity must apply to the agency on forms provided by the agency. The application must include the following:

- (1) A description and estimated cost of the damage caused by the disaster to the individual’s property.
- (2) The manner in which the individual intends to use the financial assistance.
- (3) Any other information required by the agency.

Ind. Code § 10-14-4-13.

7. The application procedures, which are set out in 290 Ind. Admin. Code 1-2-2, establish that the applicant must meet the eligibility requirements set out in 290 Ind. Admin. Code 1-2-3 and also lists the information that must be included with each application, such as the applicant’s name, address and telephone number, a description of the loss and eligible items, proof of ownership of the residence or proof of rental, proof of the applicant’s loss, and any other information that the Respondent requests to determine eligibility and award amounts. 290 Ind. Admin. Code 1-2-2.<sup>6</sup>

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<sup>6</sup> The application procedures state that the individual applicant must meet the eligibility requirements set out in 290 Ind. Admin. Code 1-2-3, which includes providing proof that the individual did not qualify for a United States Small Business Administration (USSBA) Disaster Loan by presenting a copy of the denial letter to the Respondent. However, the USSBA notifies the Respondent regarding denials, and that is what occurred in Petitioner’s case. Evidence of this notification is contained in the letter from Respondent regarding Petitioner’s potential eligibility for the Grant. See letter from respondent regarding potential eligibility for the Grant, marked as Petitioner’s Exhibit 2 and Respondent’s Exhibit 1.



The eligibility requirements include providing proof that the individual did not qualify for a USSBA disaster loan, demonstration that the loss was not covered by insurance, proof of the loss itself, completion of the application form, proof of residence at the location of the damage, residence must be in a county included in the USSBA disaster declaration, and timely submission of the application. 290 Ind. Admin. Code 1-2-3.

8. Petitioner states in her brief that the SBA removed carpet in her basement at some point due to mold and that the carpet should be covered by the Fund. However, Petitioner did not include this loss in her application for the Grant, so she would not be eligible for coverage of her basement carpet because she did not present any evidence indicating that she followed any of the above-listed application procedures for that loss.

With respect to the couch and love seat, which were listed in Petitioner's application, it is unclear whether additional documentation was submitted with Petitioner's original application form but, based on the evidence submitted in this case, it does not appear that Petitioner provided any proof that these losses were not covered by insurance, nor did she provide any documentary proof of her losses, or proof of residence. Therefore, it does not appear that Petitioner properly followed the application procedures to establish eligibility for the Fund to cover any of her damages, including the couch and love seat.

9. Respondent argues that, even if Petitioner had provided all of the information required by the application procedures and was otherwise eligible for the Grant, the items she listed in her application were not "essential furnishings" and are therefore not covered by the Fund. I agree.

290 Ind. Admin. Code 1-2-6 sets out the categories of damages that may be covered by the Fund. With respect to home furnishings, this section states that the following items may be covered: "Essential furnishings, such as living room furniture, bedroom furniture, and kitchen furnishings." 290 Ind. Admin. Code 1-2-6(a)(2).

The damaged items listed in Petitioner's application that are at issue in this case are a couch and a love seat, and she indicated in her application that those items were located in her basement.

Manuela Johnson, who has served as the Administrator for the Fund since December 2011, stated in her Affidavit that a basement is not generally considered an essential living space. (Resp. Ex. 7.)

Petitioner argues in her brief that the damaged items were located in her "lower family room" and states that this room is an essential living area. However, Petitioner has not presented any evidence indicating that the "lower family room" was the only living room area in her house or that is was, in fact, an

essential living area. The evidence presented indicates that the items were located in Petitioner's finished basement. Therefore, the couch and love seat that Petitioner wishes to use the Grant to replace do not qualify as essential furnishings according to the rules governing the administration of the Fund because they were not living room, bedroom, or kitchen furnishings.

10. Respondent further argues in its brief that, even if the couch and love seat qualified as essential furnishings, the Fund still would not cover them, per 290 Ind. Admin. Code 1-2-6(b)(5), because the items were damaged by mold, as stated in Petitioner's brief.

290 Ind. Admin. Code 1-2-6(a)(2) does not specify that the damage to an essential furnishing cannot have been caused by mold. Section (b)(5) prohibits coverage for "[r]emoval of mold or mildew." If the Fund did not want to allow for the replacement of essential furnishings that had to be thrown away because of mold or mildew, the rule likely would have specified that it would not cover any type of mold damage. Instead, the rule prohibits coverage of mold and mildew removal, which would typically consist of removing mold or mildew from structural elements of the home, not from furnishings.

Respondent contends that to interpret the rule in this manner would produce unfair results because it would negatively affect those who could salvage the mold-damaged item through removal of the mold, rather than throwing the item out entirely. However, the cost of replacing an item that cannot be salvaged will, in most cases, greatly outweigh the cost of removing the mold.

Additionally, one could also argue that the Respondent's interpretation of this rule could produce unfair results. If an essential furnishing is so damaged that it must be thrown out, and the damage is caused by the disaster, the nature of the damage should make no difference. If the item is an essential furnishing, the disaster caused the damage, and the item had to be discarded due to the severity of the damage, then the item should be covered, according to 290 Ind. Admin. Code 1-2-6.

As it stands, the rule does not specify that the Fund would not cover *any* damage caused by mold, it only states that it will not cover mold removal. Although Respondent states that it interprets the rule so that it would not cover any damage caused by mold, Respondent does not present any evidence indicating that this is an actual policy, or that Respondent has consistently applied this interpretation in all grant decisions for the Fund. Therefore, Respondent's argument that the Fund would not cover these items in this instance due to the nature of the damage is not persuasive in this case. However, this does not change the outcome of this matter, as Petitioner did not demonstrate that the damaged items listed in her application were essential furnishings.


11. In sum, the Petitioner has not carried her burden of proving by substantial and reliable evidence that she is entitled to the Grant to cover the costs of replacing or repairing the items listed in her application for the Grant under the rules contained in Ind. Code § 10-14-4 and 290 Ind. Admin. Code 1-2. The ALJ therefore concludes that the Petitioner's application for the Grant should be denied and issues this Non-Final Order.

### **DECISION AND NON-FINAL ORDER**

The ALJ hereby **DENIES** Petitioner's application for the Grant.

The Executive Director for the Indiana Department of Homeland Security, Bryan J. Langley, is the ultimate authority in this matter. Executive Director Langley will consider this non-final order in accordance with the provisions of Ind. Code §§ 4-21.5-3-7 thru -29 and the Notice of Non-Final Order also issued today.

Date: June 27, 2017

  
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